

February 1, 2007

To: Senate Judiciary Committee  
From: Amy Hall, Attorney – Montana Legal Services Association  
RE: SB 329 – Revise Family Law to Allow Consideration of Marital Misconduct in Dividing Property and Maintenance

---

Good Morning Chair Laslovich, members of the committee:

My name is Amy Hall (spelled HALL) and I am an attorney with Montana Legal Services Association. I have provided legal representation to survivors of domestic abuse for over 10 years, and served as the Managing Attorney of Montana Legal Services Association's Domestic Violence Unit.

While I realize that Senate Bill 329, if passed, would apply to all dissolutions of marriage, not just those involving domestic violence, I will focus my comments today primarily on marriages that involve domestic violence.

I urge you today to reject Senate Bill 329, which asks you to amend our dissolution and separation laws by authorizing judges to consider marital misconduct when dividing marital property and awarding maintenance (or what other states call alimony).

Throughout these comments, I may refer to domestic violence survivors using the female pronoun, just for convenience. I do not deny that men are also victimized by spousal abuse, and I've actually represented a few, but research shows that the overwhelming majority of survivors are female.

## History

Prior to 1970, most states only allowed the termination of marriage in cases where one spouse could prove that the other spouse was at fault for marital misconduct. That meant that the spouse seeking a dissolution had to prove that the other spouse had committed marital misconduct, giving the first spouse reason to want to end the marriage.<sup>1</sup>

President Ronald Reagan, while Governor of California, effectively ended the fault-based dissolution era in 1969 when he signed a law that said spouses in California could get divorced even in situations where there was no fault, or marital misconduct.<sup>2</sup>

By the end of the 1970s almost every state had enacted laws that allowed spouses to divorce without having to prove marital misconduct. Some states have added fault back into the reasons why spouses can ask for dissolutions, but no-fault reasons are still available to all spouses in those states, too.<sup>3</sup>

If SB 329 is passed, it will not mean that people will only be allowed to divorce if they can prove their spouses' marital misconduct, but it will authorize judges to consider marital misconduct when dividing marital property or awarding maintenance in a separation or dissolution.

Most states today do not allow marital misconduct to be considered when dividing marital property. The states are almost evenly split on whether or not they allow marital misconduct to be considered in decisions about maintenance. Making marital misconduct a factor in the division of marital property and in determining maintenance is a wrong choice for several reasons.<sup>4</sup>

### **Danger to Survivors and Their Children**

One reason that SB 329 is not a good idea is that it will make it harder for domestic violence survivors and their children to be safe and to get a fair award of marital property and/or maintenance.

Spousal abuse and family member assault are listed in the definition of marital misconduct in this bill. This would seem helpful to survivors, but it is not. If a survivor must prove the other spouse's abuse in order to receive a fair award of property and maintenance, the case will take longer to be finished. Those of us who work with survivors know that the most dangerous time for survivors and their children is when they are in the process of leaving the abusive relationship, including while dissolution proceedings are going on. If you talk to any family law attorney or district court judge in our state, he or she will tell you that dissolutions now can take months, or even years, to be completed. Proving abuse could add months to the long period of time that it already takes to get a dissolution, and for some survivors, that additional time could mean that they are abused again, or even be at risk of being killed.<sup>5</sup>

SB 329, by allowing proof of misconduct, virtually insures that these cases will take longer to resolve in court. This can mean more attorney fees incurred, more fees for private investigation of the alleged misconduct. If a domestic violence survivor preferred to quickly resolve a dissolution and move on with her life, she would risk losing a fair award of marital property and/or maintenance.<sup>6</sup> Yet if a survivor decided to litigate all issues fully, the continued contact with the other spouse might expose the survivor and her children to more abuse.<sup>7</sup>

While we all want to see abusive spouses take responsibility for their actions and survivors to be compensated for the abuse they've suffered, trying to do this through mandating the consideration of marital misconduct is not the answer. Montana's current legislative scheme is equitable to both spouses, whether or not misconduct has occurred. If we want to pass legislation supportive of spouses who have been victimized by marital misconduct, we can strengthen laws and punishments for abuse. We can provide law enforcement and the courts with the money and personnel they need to more effectively address intimate partner abuse. We can teach children respect for themselves and others so that they don't abuse others or accept being abused. Although it may sound like a good idea, SB 329 is not a good way to help survivors.

### **It is Difficult for Judges to Decide Which Spouse is Guilty of Marital Misconduct**

Another reason that SB 329 is not a good idea is that the very nature of domestic violence makes it extremely difficult for judges to determine if a spouse is abusive. Domestic violence is often secret, often not understood, and unfortunately survivors are often blamed for their own abuse.

In most cases domestic violence is not caused by losing one's temper or acting out of uncontrollable anger. It is a continual process of asserting power and control over someone who is a family member or intimate partner. An example of this is that most abusers don't abuse their bosses when they get mad, they don't abuse their coworkers when they don't do what they want, and they don't abuse judges who are handling their cases.

Proving domestic violence in a court often boils down to "he said, he said" situations. Ask any judge how much he or she likes trying to decide who is abusive and you'll see rolling eyes and frowns, if not worse. Judges are smart. Judges know many times when someone is lying and when someone is telling the truth, but because of the nature of domestic violence even judges often can't tell who is an abuser and who is a survivor of abuse.

So, you say, it's unfortunate if a survivor can't prove abuse, but that doesn't mean that the survivor won't get a fair share of marital property or maintenance in the dissolution, right? Unfortunately, wrong. Many abusers react to losing control over survivors by trying to make survivors' lives unbearable. Often, abusers accuse survivors of being drug or alcohol addicts, abusive parents, adulterers, and any other bad thing you might think of.

Unfortunately, people—including judges—sometimes believe the lies that abusers tell about survivors. This is because abusers often just don't seem like they would hit, kick, or strangle their family members, and because survivors—suffering from terror, Post Traumatic Stress Disorder, financial desperation, and a whole lot of other problems—can seem unlikeable and irrational and may not have the resources to fight the allegations of marital misconduct made against them. In those cases survivors could actually lose their rightful share of property and maintenance due to SB 329.

### **Encourages Hostilities Which Hurt Kids**

I urge you to reject SB 329 for another reason, perhaps the most important reason, and this is because it will hurt children. Encouraging spouses to engage in efforts to make the other spouse look bad encourages a higher level of hostility than in cases where making the other parent look bad has no financial reward. Encouraging hostility is exactly opposite of the efforts we've made in Montana to encourage and support divorcing parents to work together in peace for the sake of their children. The fact is that even in cases where one parent has been abusive towards the other, most of the time both parents continue to have parenting time with the children. SB 329 would encourage a legal process that in essence requires parents to battle in situations where those parents will continue to have contact with one another and where escalating hostilities may result in danger to one of the parents, and even to the children.

One aspect about SB 329 that relates to children is particularly troubling. The bill states that marital misconduct includes "interference with contact with a child." This provision doesn't cite directly to any particular statute and so we don't know—and a judge in a dissolution case wouldn't know—exactly what the actions intended to be covered by this reference are. Therefore, judges would be given the unenviable task of interpreting whether or not there has been interference with contact with a child

for the purposes of determining marital misconduct with absolutely no guidance. The result is that different judges would interpret and apply the law differently.

Besides the problem of not knowing what "interference with contact with a child" means, bringing the issue of parenting time directly into the definition of marital misconduct practically begs divorcing parents to engage in the most direct and horrible battle about their children that they can, all towards the goal of being awarded marital property and/or maintenance, and all with the result that their children suffer.

### **Unintended Consequences**

Yet a last reason why SB 329 should be rejected is that it could cause spouses who have been found "guilty" of marital misconduct to be destitute, since they may not have marital property or maintenance to sustain them. Since public benefits are not excluded from such spouses, it is possible that the public could become responsible for sustaining spouses who otherwise would have not needed assistance.

### **Conclusion**

In sum, I urge you to reject SB 329. It would be harmful for survivors of domestic violence and their children, and it would create un-solvable complications for judges who would be faced with the task of applying it to the dissolution cases that they handle, and potentially for the public in general. Thank you for your time.

---

<sup>1</sup> 1997 U. Ill. L. Rev. 719, 722-723

<sup>2</sup> [www.library.ca.gov/crb/98/04/currentstate.pdf](http://www.library.ca.gov/crb/98/04/currentstate.pdf) (viewed on 01/30/2007)

<sup>3</sup> 1997 U. Ill. L. Rev. 719, 722-723

<sup>4</sup> 1997 U. Ill. L. Rev. 719, 723.

<sup>5</sup> 4 Va. J. Soc. Pol'y & L. 263, 273-274

<sup>6</sup> 83 A.B.A.J. 50,

<sup>7</sup> 79 MI Bar Jnl. 190, 191